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THE TAX LAWYER

TAXES 10/17/2014

IRS Explains How To Come Clean On Offshore Accounts

In [Which IRS Offshore Amnesty Program Is Right For You?](#) I suggested issues to consider in offshore account disclosures to the IRS. Since then, the IRS has clarified disclosure programs. The IRS even developed official forms to replace the old Word documents and Excel spreadsheets:

- [Form 14452](#) – Foreign Account or Asset Statement
- [Form 14453](#) – Penalty Computation Worksheet
- [Form 14454](#) – Attachment to Offshore Voluntary Disclosure Letter
- [Form 14457](#) – Offshore Voluntary Disclosure Letter
- [Form 14653](#) – Foreign Streamlined Certification
- [Form 14654](#) – Domestic Streamlined Certification – be careful, you are expected to include a statement attesting to your non-willfulness directly on this form, signed under penalties of perjury.

Figuring out your culpability is key to selecting the right program. Eligibility for the Streamlined program hinges on being non-willful. So watch for [signs your tax missteps are 'willful' triggering penalties or jail](#). What does the IRS think is willful vs. not? The IRS sticks with the following definition: “*Non-willful conduct is conduct that is due to negligence, inadvertence, or mistake or conduct that is the result of a good faith misunderstanding of the requirements of the law.*”

With that in mind, what did the IRS say with these most recent updates?



Banknotes of the Swiss franc (Photo credit: Wikipedia)

Streamlined Guidance Update – General Information: The overview of the streamlined programs has been made more readable. Not much has changed, but the IRS has made one crucial clarification to taxpayer eligibility.

It has been clear since the Streamlined programs were announced that you cannot use both the OVDP (with its comforting, though expensive, closing agreement) and the Streamlined programs (with their more generous penalties). But when do you have to choose? When you submit your formal application to the OVDP program, described in OVDP FAQ #24. That means being pre-cleared is not a bar to using the Streamlined procedures. But be careful, because the IRS typically expects a response within 45 days of being pre-cleared.

Foreign Streamlined Guidance Update (no additional penalty): The guidance has been reorganized, but no big changes here. Recall that for Foreign Streamlined only, you can submit original unfiled returns as well as amended returns. The Domestic Streamlined program only allows amended returns.

Foreign Streamlined FAQ: One lonely explanation that references to IRC § 911 residency only refers to the term “abode” for purposes of eligibility. Whether you have a U.S. abode is only one of the elements of the Foreign Streamlined non-residency test.

Domestic Streamlined Guidance Update (5% miscellaneous penalty on your highest *year-end* aggregate account balance over the prior 6 years): The overall guidance is the same, but it has been reorganized and made a little more user friendly.

Domestic Streamlined FAQ: These are the big change, and they provide very useful, though not necessarily taxpayer friendly guidance. Since the 5% penalty was announced back in July, it has been a scramble to figure out exactly what accounts have to be included in the penalty base.

Domestic Streamlined FAQ #1 – Streamlined Penalty Base: Incorporates [OVDP FAQ #s 31, 32, 33, 35.1, 38, 39, 40, and 41](#).

- OVDP FAQ #31: Currency Conversion Rate – use the end of year rate.
- OVDP FAQ #32: Business accounts must be included.
- OVDP FAQ #33: No *de minimus* reporting amount
- OVDP FAQ #35.1: Penalty applies to the taxpayer's interest in underlying assets without regard to valuation discounts.
- OVDP FAQ #38: Signature authority accounts are excluded from the penalty base because they are unrelated to tax noncompliance.
- OVDP FAQ #39: Children who have joint accounts with their parents, but are merely signatories, can file delinquent FBARs with an explanatory statement. The beneficial owner will pay the relevant penalty.
- OVDP FAQ #40: For accounts with multiple owners, each owner is treated as owning their proportional share. However, the burden is on the taxpayer to establish less than 100% ownership.
- OVDP FAQ #41: Only one penalty per account will be assessed in the case of multiple owners. All owners still have a reporting requirement.

In some situations, there can be a significant difference between the penalty base in the OVDP and Domestic Streamlined Program. In the OVDP, if you reported all the income from an account and paid all the tax, OVDP FAQ #35 excludes the account from the penalty base. For Streamlined, compliant but unreported accounts must be included in the 5% penalty base. For example, suppose that a Taxpayer has five accounts:

- Account 1 = \$5 million – No FBAR, tax compliant
- Account 2 = \$100,000 – No FBAR, tax non-compliant
- Account 3 = \$100,000 – No FBAR, tax non-compliant
- Account 4 = \$100,000 – No FBAR, tax non-compliant
- Account 5 = \$100,000 – No FBAR, tax non-compliant

In the OVDP, you can exclude the tax compliant accounts from the penalty base. The penalty = $27.5\% \times \Sigma(\text{Accounts 2-5}) = 27.5\% \times \$400,000 = \$110,000$.

In Domestic Streamlined, you must include *all* accounts that were *either* unreported or tax non-compliant. Thus, the penalty = $5\% \times \Sigma(\text{Accounts 1-5}) = 5\% \times \$5.4 \text{ million} = \$270,000$.

The theory appears to be that if you reported all your income, and paid all your taxes on an account, that account is not related to your tax noncompliance. The IRS repeats the point in FAQ

#38. It excludes signature authority accounts because they are “treated as unrelated to the tax noncompliance the taxpayer is voluntarily disclosing.” FAQ #38 gives you a free pass in both the OVDP and the Domestic Streamlined penalties.

However, tax compliance apparently is not enough in Streamlined if you failed to file your paperwork. The net result is that if you have a large, tax compliant account, and several small non-compliant accounts (say, inherited accounts, or gifts from foreign, well-meaning relatives), you may be better off with the OVDP. Of course, you should always consider the number of years, taxes, interest, penalties, and even the administrative costs.

If all of your accounts are tax-compliant, you can try for the Delinquent Filing programs and may escape penalties entirely. Check out [Delinquent FBAR Submissions](#), which is reorganized. [Delinquent International Information Return Submissions](#) now provides more information on the required reasonable cause statement. Finally, check out the [Delinquent International Information Return Submission FAQs](#). They have many good pointers.

The reasonable cause statement must include a statement of facts and be signed under penalties of perjury. For examples, see Treasury Regulation Sections [1.6038-2\(k\)\(3\)](#), [1.6038A-4\(b\)](#), and [301.6679-1\(a\)\(3\)](#) (regulations specific to informational returns). They do not reference Internal Revenue Code Sections [6662](#) or [6664](#), though they don’t exclude them either. In practice, these statements may be similar to the Streamlined certifications of non-willfulness. However, non-willful does not automatically establish reasonable cause.

Check out the IRS guidance and get some advice on your facts.

Contact me at Wood@WoodLLP.com. This discussion is not intended as legal advice, and cannot be relied upon for any purpose without the services of a qualified professional.